

UNITED STATES OF AMERICA  
BEFORE THE NATIONAL LABOR RELATIONS BOARD

SOUTHERN BAKERIES, LLC

and

BAKERY, CONFECTIONARY, TOBACCO  
WORKERS, AND GRAIN MILLERS UNION

Case 15-CA-174022

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**RESPONDENT SOUTHERN BAKERIES LLC'S CROSS-EXCEPTION TO THE  
ADMINISTRATIVE LAW JUDGE'S DECISION ON REMAND**

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Respondent Southern Bakeries, LLC ("SBC"), by counsel, pursuant to Section 102.46 of the Board's Rules and Regulations, hereby submits its cross-exception to the Decision on Remand of Administrative Law Judge Arthur J. Amchan (the "ALJ"), dated February 11, 2019, in the following particulars:

Cross-Exception: The ALJ erred in finding that SBC violated Section 8(a)(1) by maintaining a work rule that prohibits employees from using company time or resources for personal use unrelated to employment.

**ARGUMENT IN SUPPORT OF CROSS-EXCEPTION**

On December 7, 2018, the Board remanded this case for further consideration of several work rule allegations under *The Boeing Company*, 365 NLRB No. 154, 2017 WL 6403495 (2017), including a work rule that prohibited using company time or resources for personal use unrelated to employment with the company without prior authorization. This work rule should be deemed lawful under *Boeing*. Put

simply, an employee would not reasonably construe the rule as restricting Section 7 rights. Moreover, SBC has a legitimate justification behind the rule that outweighs any potential interference. Accordingly, SBC respectfully requests that the ALJ's determination that the work rule violates Section 8(a)(1) be reversed and that the charge be dismissed.

## **I. OVERVIEW OF THE *BOEING* STANDARD**

In *Boeing*, the Board overruled the framework set forth in *Lutheran Heritage Village-Livonia*, 343 NLRB 646 (2004), stating that it would “no longer find unlawful the mere maintenance of facially neutral employment policies, work rules and handbook provisions based on a single inquiry, which made legality turn on whether an employee ‘would reasonably construe’ a rule to prohibit some type of potential Section 7 activity that might (or might not) occur in the future.” *Boeing*, 2017 WL 6403495, at \*2. Rather, “when evaluating a facially neutral policy, rule or handbook provision that, when reasonably interpreted, would potentially interfere with the exercise of NLRA rights, the Board will evaluate two things: (i) the nature and extent of the potential impact on NLRA rights, *and* (ii) legitimate justifications associated with the rule.” *Id.* at \*4 (emphasis in original). This evaluation is to be conducted “consistent with the Board’s ‘duty to strike the proper balance between . . . asserted business justifications and the invasion of employee rights in light of the Act and its policy,’ focusing on the perspective of employees . . .” *Id.*

The Board then delineated three categories of employment policies, rules and handbook provisions, which “represent a classification of results from the Board’s

application of the new test.” *Id.* at \*4-5. With regard to those rules that fall into Category 2, the General Counsel has opined that “the legality of such rules will depend on context,” and that “general or conclusory prohibitions do not have to be perfect.” Memorandum GC 18-04, “Guidance on Handbook Rules Post-*Boeing*,” 2018 WL 2761555, at \*10 (June 6, 2018). “Rather, such rules should be viewed as they would by employees who interpret work rules as they apply to the everydayness of their job.” *Id.* Context also includes considering the placement of the rule among other rules, the kinds of examples provided, the type and character of the workplace, and whether the rule has actually caused employees to refrain from Section 7 activity. *Id.*

## II. LEGAL ARGUMENT

The rule for consideration in this cross-exception is Group A, Rule 3, which prohibits employees from:

Using company time or resources for personal use unrelated to employment with the company without prior authorization. This includes leaving company property during paid breaks or leaving your assigned job or work area without permission.

(Second Consolidated Complaint ¶ 7(b)(i)).

Analyzing the rule under the *Boeing* framework dictates a finding that the rule is lawful, as any risk of intruding on NLRA rights is “comparatively slight” and SBC has a substantial justification behind the rule given its production setting. *See Boeing*, 2017 WL 6403495 at \*16. There is nothing in or about the rule that suggests to employees that they cannot engage in protected concerted activity. The rule prohibits only “Using company time or resources for personal use unrelated to

employment with the company without prior authorization.” The example in the second sentence of the rule regarding leaving one’s work station without permission should not be read in isolation and should be read in the entire context of the rule. Protected concerted activity only protects behavior or action as related to wages, hours and other terms and conditions of employment, so by definition only conduct that is work-related. If an employee were to engage in a work stoppage, discuss terms or conditions of employment, or other Section 7 activity, this would necessarily be related to, not unrelated to employment, and therefore not encompassed or prohibited by the express language of the rule. On the other hand, using company electronic resources for wedding planning or general social discourse would properly be prohibited as not work related.

Moreover, under the second prong of the *Boeing* analysis, the rule is substantially justified, as it facilitates SBC’s continuous production system by requiring employees to remain on the job and work, unless excused, to avoid unproductive downtime and production problems arising from failure to constantly monitor the process. (Tr.290:12-291:8, 292:11-293:7.) SBC also has a valid business interest in assuring that employees do not use its resources for personal rather than business reasons, including stealing time by engaging in personal business or activities while on-the-clock. (Tr.291:22-25.) This rule also serves a safety purpose in assuring that SBC can account for the whereabouts of all its employees in the event of an emergency situation, such as a fire, requiring evacuation of the facility. (Tr.292:1-10.)

However, in finding the rule unlawful, the ALJ stated the following:

I find nothing illegal in the requirement that employees are required to stay on company property during paid breaks. They apparently are subject to being called upon during these breaks to fill-in for other employees, Tr. 290. However, I find this rule is likely to be interpreted as restricting Section 7 rights given [SBC's] failure to distinguish between employee rights during working time and break time, *Hyundai American Shipping Agency, Inc.*, 357 NLRB 860, 872-73 (2011), enfd. 805 F.3d 309 (D.C. Cir. 2015). A reasonable person would likely read the rule as prohibiting, for example, solicitation on behalf on [sic] a union during a paid break time in a break room. Per *Boeing*, I find that [SBC] has not shown that it has a sufficient justification to prohibit protected activity during non-working time, even if that time is paid time. Thus, I conclude that the rule as written violates Section 8(a)(1).

(ALJ Remand Decision at 3.)

The ALJ's analysis simply does not comport with common sense. It defies reason that a reasonable person reading the rule would somehow interpret it as prohibiting "solicitation on behalf of a union during a paid break time in a break room." If that were the case, the same "reasonable person" would interpret the rule as prohibiting him or her from having any "personal" discussions whatsoever during paid break time in the break room (such as discussing sports or American Idol around the water cooler), because such conversations would be "unrelated to employment." The ALJ's contorted hypothetical is exactly the kind of analysis that caused this Board to overrule the *Lutheran Heritage* "reasonably construe" standard. *See Boeing*, 2017 WL 6403495, at \*10-11 & n.41 (noting that "linguistic perfection" should not be expected from employers in adopting work rules).

In sum, Group A, Rule 3 is lawful. It serves only a legitimate purpose of maintaining the continuous production process and protecting Company resources, including preventing the theft of time and assuring the safety of employees and Company property. It should be upheld under *Boeing*.

### III. CONCLUSION

Respondent Southern Bakeries, LLC respectfully requests that the Board grant its cross-exception and reverse the ALJ's rulings, findings and conclusions on remand insofar as they have been challenged herein.

Respectfully submitted,

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### CERTIFICATE OF SERVICE

I hereby certify that on April 15, 2019, a copy of the foregoing “Respondent Southern Bakeries LLC’s Cross-Exceptions to the Decision of the Administrative Law Judge’s Decision on Remand.” was filed electronically with the National Labor Relations Board and has been served upon the following by email:

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/s/ David L. Swider

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